

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC BRUCE DINKINS,

Defendant-Appellant.

UNPUBLISHED

July 25, 1997

No. 191519

St. Clair Circuit Court

LC No. 95-000974-FH

Before: Doctoroff, P.J., and MacKenzie and Griffin, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by jury of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(f); MSA 28.788(2)(1)(f), unarmed robbery, MCL 750.530; MSA 28.798, conspiracy to commit unarmed robbery, MCL 750.530; MSA 28.798, and unlawful driving away of a motor vehicle (UDAA), MCL 750.413; MSA 28.645. The trial court, having determined that defendant was a fourth-felony offender under MCL 79.12; MSA 28.1084, sentenced him to concurrent terms of thirty to forty-five years in prison for the CSC I conviction, nine to thirty years for the unarmed robbery and conspiracy convictions, and three to ten years for the UDAA conviction. We affirm defendant's convictions and remand for resentencing on all but his CSC I conviction.

Defendant first argues that the trial court erred when it sentenced him as a fourth felony offender because three of his prior convictions arose from the same criminal incident. The People concede that the trial court erred, and we agree. *People v Stoudemire*, 429 Mich 262, 278; 414 NW2d 693 (1987); *People v Pruess*, 436 Mich 714; 461 NW2d 703 (1990). The trial court should have enhanced defendant's sentences based on his status as a second felony offender, not fourth.

Defendant contends that this Court should remand for resentencing on all of his convictions. However, defendant's sentence for CSC I was proper. Under the CSC I statute, the trial court had the discretion to sentence defendant to life in prison; its authority to impose up to a life sentence was not derived from the habitual offender statute. This Court has held that "if the sentence exceeds that allowed by law, the entire judgment is not rendered null and void. Rather, the court is required only to correct the unlawful sentence." *People v Williams (After Second Remand)*, 208 Mich App 60, 64;

526 NW2d 614 (1994), citing MCL 769.24; MSA 28.1094. We therefore remand for resentencing on defendant's convictions for unarmed robbery, conspiracy, and UDAA. Defendant's CSC I sentence is affirmed.

Next, defendant argues that the trial court should have sua sponte instructed the jury that defendant's prior conviction for armed robbery could be considered only for impeachment purposes. We find no error. MRE 609 is inapplicable because defendant's prior conviction was not admitted to impeach him. Rather, defendant testified about his prior conviction during direct examination to establish his defense of duress -- that it was his fear of going back to prison and being killed by police that forced him to rob the complainant. Under these circumstances, defendant was not entitled to an instruction limiting use of the evidence to impeachment.

Defendant also argues that the trial court abused its discretion by not sua sponte scheduling a hearing on his motion for severance and by not severing defendant's trial from that of codefendant Allen Jones-Bey. Defendant argues that this was an abuse of discretion because the two had antagonistic defenses. In order to be antagonistic, defenses must be mutually exclusive, or, in other words, the jury "in order to believe the core of the evidence offered on behalf of one defendant, must disbelieve the core of the evidence offered on behalf of the codefendant." *People v Hana*, 447 Mich 325, 350; 524 NW2d 682 (1994). Here, the defenses were not antagonistic because both defendant and his codefendant testified in essentially the same manner. Accordingly, there was no abuse of discretion in failing to sever the cases. *Id.* at 331.

Defendant further argues that the trial court abused its discretion when it did not grant him a continuance to locate a missing witness. The witness was allegedly the source of information that the local police would shoot first and ask questions later if they found defendant. Some of the factors to be considered when determining whether a continuance should be awarded include whether the defendant "(1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) had been negligent, and (4) had requested previous adjournments." *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). The defendant must also demonstrate prejudice. *Id.* Here, although defendant did make repeated requests for a continuance to secure the subpoenaed witness' testimony, the testimony was not especially probative because testimony conveying the same information had already been elicited through another witness. Furthermore, defense counsel did nothing to secure the testimony before trial. We also note that the missing witness was wanted for violation of his parole and there was no assurance that the witness would ever be found. Under these circumstances, we find no abuse of discretion. *Lawton, supra*, at 348.

Finally, defendant argues that he was denied effective assistance of counsel because his counsel failed to pursue a previously filed motion for severance, failed to request that defendant's jury be instructed regarding the limited admissibility of certain evidence, failed to object to the improper enhancement of his sentence as a fourth habitual offender, and failed to properly and timely review the presentence investigation report with him. In order to establish a claim of ineffective assistance of counsel, the defendant must show that counsel's performance fell below an objective standard of

reasonableness, and that the representation so prejudiced the defendant as to deprive him or her of a fair trial. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994).

Defendant's counsel was not ineffective. Ineffective representation justifies reversal when it so prejudices a defendant that there is a "reasonable probability that, absent errors, the factfinder would have reasonable doubt respecting guilt." *Pickens, supra*, p 309. Here, as has been discussed, defense counsel's pursuit of defendant's previously filed motion for severance would have been futile because the defenses were not antagonistic. A request to instruct the jury regarding limited use of defendant's prior conviction would have been futile because it was defendant who brought up his prior conviction during direct examination as part of his defense. Defendant's sentences for unarmed robbery, conspiracy, and UDAA were improperly enhanced; that error did not deprive defendant of a fair trial, however, and will be corrected without a new trial. Finally, to the extent that defendant claims counsel failed to timely review the presentence report, he has not identified any inaccuracies in the report or explained how they were prejudicial. The claim is therefore abandoned. MCR 7.212(C)(7).

Convictions affirmed. Remanded for resentencing on the unarmed robbery, conspiracy to commit unarmed robbery, and UDAA convictions. We do not retain jurisdiction.

/s/ Martin M. Doctoroff
/s/ Barbara B. MacKenzie
/s/ Richard Allen Griffin